

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

BENJAMIN WERNER

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or  
a Revision of a Determination or a Refund  
of <sup>Personal Income and</sup> Unincorporated Business  
Taxes under Article(s) 22 & 23 of the  
Tax Law for the Year(s) ~~or Period(s)~~  
1967, 1968 and 1969.

State of New York  
County of Albany

Bruce Batchelor, being duly sworn, deposes and says that  
~~he~~ is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 28th day of February, 1977, ~~he~~ served the within  
Notice of Decision by (certified) mail upon Benjamin Werner

~~(representative of)~~ the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows:

Mr. Benjamin Werner  
1430 Seagirt Boulevard  
Far Rockaway, New York 11691

and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the ~~(representative of)~~  
~~of the~~ petitioner herein and that the address set forth on said wrapper is the  
last known address of the ~~(representative of the)~~ petitioner.

Sworn to before me this

28th day of February, 1977.

Bruce Batchelor

Janet Mack



STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE

TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N.Y. 12227

STATE TAX COMMISSION

ADDRESS YOUR REPLY TO

February 28, 1977

TELEPHONE: (518) 457-1723

Mr. Benjamin Werner  
1430 Seagirt Boulevard  
Far Rockaway, New York 11691

Dear Mr. Werner:

Please take notice of the **DECISION**  
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to  
Section(s) **690 & 722** of the Tax Law, any  
proceeding in court to review an adverse deci-  
sion must be commenced within **4 months**  
from the date of this notice.

Inquiries concerning the computation of tax  
due or refund allowed in accordance with this  
decision or concerning any other matter relative  
hereto may be addressed to the undersigned. They  
will be referred to the proper party for reply.

Very truly yours,

*Paul B. Coburn*  
Paul B. Coburn  
Supervising Tax  
Hearing Officer

Enc.

cc: ~~XXXXXXXXXXXXXXXXXXXX~~

Taxing Bureau's Representative:

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
BENJAMIN WERNER :  
for Redetermination of a Deficiency : DECISION  
or for Refund of Personal Income and :  
Unincorporated Business Taxes under :  
Articles 22 and 23 of the Tax Law :  
for the Years 1967, 1968 and 1969. :

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Petitioner, Benjamin Werner, of 1430 Seagirt Boulevard, Far Rockaway, New York 11691, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1967, 1968 and 1969. (File No. 00520).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 16, 1976 at 9:15 A.M. The petitioner appeared pro se. The Income Tax Bureau appeared by Peter Crotty, Esq., (Arthur Rosen, Esq., of counsel).

ISSUES

I. Whether the petitioner is liable for additional New York State personal income taxes for 1968 and 1969, as a result of adjustments made by the Income Tax Bureau, so as to conform with Federal audit adjustments for those years.

II. Whether the activities of the petitioner, Benjamin Werner, in trading stocks and bonds, constituted the carrying on of an unincorporated business subject to the unincorporated business tax under Article 23 of the Tax Law for the years 1967, 1968 and 1969.

III. Whether penalties were properly imposed under section 685(a) for the years 1967 and 1968, and under section 685(a)(1) and 685(a)(2) for the year 1969.

#### FINDINGS OF FACT

1. As a result of their being notified by the Internal Revenue Service of adjustments made in the Federal income tax of the petitioner, Benjamin Werner, for the years 1968 and 1969, the Income Tax Bureau sent the petitioner, Benjamin Werner, a Notice of Deficiency dated May 20, 1974 for both personal income taxes and unincorporated business taxes for the years 1967, 1968 and 1969.

2. Petitioner, Benjamin Werner, filed separate New York State income tax resident returns for 1968 and 1969. For 1967, petitioner filed a combined New York State Income Tax Return (Form IT-208) with his wife, Ida Weiner a/k/a Ida Werner. No unincorporated business tax returns were filed by petitioner, Benjamin Werner, for 1967, 1968 and 1969.

3. Petitioner, Benjamin Werner, was a stockbroker in over-the-counter securities. He was licensed by the National Association of Security Dealers and, during the period in question, was registered

as a broker by the Federal Securities and Exchange Commission. He had no academic training in finance. There is no professional license for stockbrokers in New York State. Petitioner, Benjamin Werner, earned most of his income from commissions. Listed stocks and bonds were traded through brokers who were members of one or more of the established stock exchanges.

4. Petitioner, Benjamin Werner, did substantial trading in stocks and bonds on his own account. He filed Federal income tax returns for 1968 and 1969, but those returns did not include Schedule D "Gains & Losses from Sales or Exchange of Property". The amount of income derived from the employment of petitioner's own capital was not shown.

5. Petitioner, Benjamin Werner, filed Federal Income Tax Returns, Form 1040, for 1968 and 1969 which included Schedule C - "Profit (or loss) from Business or Profession", and described his business as "stockbroker". On both Form 1040's, petitioner, Benjamin Werner, indicated that he was self-employed. He paid social security self-employment tax for 1968 and 1969.

6. Petitioner, Benjamin Werner, maintained an office in the financial district of New York City. He employed occasional clerical help and used messengers for pick-up and delivery of stocks and bonds.

7. A conference audit report dated 8/17/72 of the Internal Revenue Service supplemented the IRS examination report of 6/1/71 regarding the tax years 1968 and 1969. The report detailed the adjustments made to the Federal income tax of petitioner, Benjamin Werner. The increase was \$4,374.61 for 1968 and \$18,611.82 for 1969. The report showed that petitioner, Benjamin Werner, had been unable to substantiate satisfactorily to IRS in whole or in part, some of his deductions on the Federal income tax returns for 1968 and 1969. Petitioner, Benjamin Werner, differed with the Internal Revenue Service, but was unable to provide sufficient documentation, or substantiate his claims. He was not able to do so before the IRS or at the formal hearing.

8. Petitioner, Benjamin Werner, regarded himself as a professional just as a lawyer, doctor or whoever else is exempt under the Tax Law from the imposition of unincorporated business tax.

#### CONCLUSIONS OF LAW

A. That the business activities of petitioner, Benjamin Werner, as a broker buying and selling over-the-counter stocks and bonds did not constitute the practice of a profession within the intent and meaning of section 703(c) of the Tax Law.

B. That the business activities of the petitioner, Benjamin Werner, as a stockbroker buying and selling stocks and bonds on commission, constituted the carrying on of an unincorporated business subject to unincorporated business taxes for the years 1967, 1968 and 1969.

C. That petitioner, Benjamin Werner, did not sustain the burden of proof that the determination of the Internal Revenue Service was erroneous, as to the adjustments made in his Federal taxable income. That the adjustments made are determined to be accurate within the meaning of section 659 of the Tax Law.

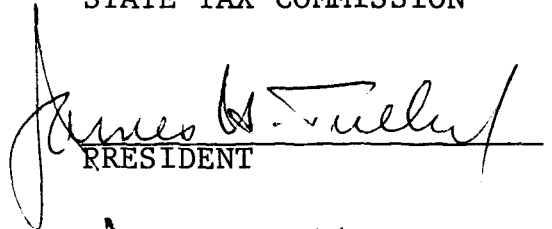
D. That petitioner, Benjamin Werner, erroneously but in good faith and on the advice of his accountant believed that, as a stockbroker, he was exempt as a professional from the requirement to file unincorporated business tax returns. The penalty is cancelled for 1967 and 1968 under section 685(a), and for 1969 under section 685(a)(1) and 685(a)(2) of the Tax Law.

E. That the petition of Benjamin Werner is granted to the extent of cancelling the penalties imposed, that the Income Tax Bureau is hereby directed to accordingly modify the Notice of

Deficiency issued May 20, 1974 and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
February 28, 1977

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



STATE OF NEW YORK  
STATE TAX COMMISSION

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Notice of Decision by (certified) mail upon Benjamin Werner

~~(representative of)~~ the petitioner in the within proceeding,  
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as follows: Mr. Benjamin Werner  
410 E. Broadway #7P  
Long Beach, NY 11561

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~~of the)~~ petitioner herein and that the address set forth on said wrapper is the  
last known address of the ~~(representative of the)~~ petitioner.

Sworn to before me this

18th day of March, 1977.

Bruce Batchelor

Janet Mack

**FORMAL HEARING**

TA-26 (4-76) 25M

**STATE OF NEW YORK**  
Department of Taxation and Finance  
**TAX APPEALS BUREAU**

STATE CAMPUS  
ALBANY, N. Y. 12227

*Mr. Benjamin Werner*

Mr. Benjamin Werner  
~~1430 Seagirt Boulevard~~  
Far Rockaway, New York 11691

